

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



ALFRED MCKNIGHT,

Charging Party,

v.

CITY OF SANTA MONICA,

Respondent.

Case No. LA-CE-523-M

Request for Reconsideration
PERB Decision No. 2211-M

PERB Decision No. 2211a-M
December 29, 2011

Appearances: Law Office of Vida M. Holguin by Vida M. Holguin, Attorney, for Alfred McKnight; Barbara Greenstein, Deputy City Attorney, for City of Santa Monica.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by Alfred McKnight (McKnight) of the Board's decision in *City of Santa Monica* (2011) PERB Decision No. 2211-M. In that decision, the Board dismissed a complaint and underlying charge alleging that the City of Santa Monica (City) terminated McKnight's probationary employment in retaliation for having filed grievances concerning his employment with the City, thereby committing an unfair practice under the Meyers-Milias-Brown Act (MMBA).¹

In its decision, the Board determined that McKnight established the elements of protected activity, employer knowledge, and adverse action, under the standards set forth in the Board's decision in *Novato Unified School District* (1982) PERB Decision No. 210. The Board determined, however, that McKnight failed to establish an unlawful motive in the City's decision to terminate his probationary employment, and therefore failed to establish a nexus

¹ The MMBA is codified at Government Code section 3500 et seq.

between the protected activity and the adverse action. The Board further found that, even assuming for the sake of argument that McKnight had established a prima facie case of retaliation, the City nonetheless established that it would have rejected McKnight on probation despite his protected activity.

The Board has reviewed McKnight's request for reconsideration and the City's response thereto in light of the relevant law.² Based on this review, the Board denies McKnight's request for reconsideration for the reasons discussed below.

PROCEDURAL BACKGROUND

On March 20, 2009, McKnight filed an unfair practice charge alleging that the City terminated his probationary employment in retaliation for having engaged in protected activity. On November 24, 2009, the PERB Office of the General Counsel issued a complaint based upon these allegations. After a hearing before an administrative law judge (ALJ), the ALJ issued a proposed decision finding that the City terminated McKnight's probationary employment in retaliation for having filed grievances concerning his employment. Following exceptions filed by the City, on October 24, 2011, the Board issued a decision reversing the ALJ's proposed decision and dismissing the charge and complaint. On November 14, 2011, McKnight filed a timely request for reconsideration of the Board's decision.

ASSERTED GROUNDS FOR RECONSIDERATION

McKnight asserts that reconsideration should be granted because the record contains sufficient evidence of nexus based upon (1) inconsistent or contradictory justifications for the City's actions; (2) cursory investigation of McKnight's alleged poor performance; (3) disparate

² McKnight submitted a reply to the City's opposition to his request for reconsideration. Nothing in PERB Regulation 32410(a) authorizes the filing of a reply to an opposition to a request for reconsideration. Therefore, the Board does not consider McKnight's reply brief in making its determination. (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

treatment of McKnight; (4) other facts demonstrating unlawful motive; and (5) McKnight was not a probationary employee when he was terminated.

THE CITY'S RESPONSE

The City disputes that grounds for reconsideration exist. In addition, the City contends that, in the event the Board grants reconsideration, it will have to consider additional evidence not considered by the Board or the ALJ and other evidentiary matters.

DISCUSSION

Requests for reconsideration of a final Board decision are governed by PERB Regulation 32410(a), which states in full:

Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. An original and five copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

Because reconsideration may only be granted under "extraordinary circumstances," the Board applies the regulation's criteria strictly. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H.) A request for reconsideration "is not simply an opportunity to ask the Board to 'try again.'" (*Chula Vista Elementary School District* (2004) PERB Decision

No. 1557a.) PERB Regulation 32410(a) allows a party to request reconsideration of a Board decision only on two grounds: (1) the decision contains “prejudicial errors of fact;” or (2) previously unavailable and undiscoverable newly discovered evidence that is both relevant and submitted within a reasonable time of discovery would impact or alter the decision. These limited grounds preclude a party from using the reconsideration process to reargue or relitigate issues that have already been decided. (*Redwoods Community College District* (1994) PERB Decision No. 1047a.)

McKnight asserts only the first ground for reconsideration, that the Board’s decision contains prejudicial errors of fact. To establish a basis for reconsideration on this ground, the Board’s errors must be factual, not legal, in nature. Therefore, a disagreement over the legal analysis employed by the Board is not grounds for reconsideration even if it amounts to a prejudicial error of law resulting from application of its own case law. (*California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479a-S (*California State Employees Assn.*)).

Inconsistent Justifications

McKnight asserts that the Board erred in failing to find that evidence that the City gave McKnight conflicting reasons for his termination supported finding of nexus and unlawful motivation. McKnight does not, however, identify any evidence in the record to support this claim. Moreover, “inconsistent justifications” was not one of the nexus factors identified by the ALJ or raised on exceptions before the Board.³ Instead, the ALJ determined that the failure to question the employees involved in the incidents immediately preceding McKnight’s termination and the failure to provide reasons for terminating McKnight’s probationary employment constituted sufficient evidence of nexus. The Board overturned these legal determinations,

³ McKnight did not file exceptions to the ALJ’s proposed decision.

finding that the failure to interview employees in the absence of evidence establishing a regular practice of doing so did not support an inference of unlawful motive, and the failure to provide a probationary employee with reasons for termination does not indicate unlawful motive in the absence of evidence that the employer was required by law, policy or past practice to do so. (*County of Riverside* (2011) PERB Decision No. 2184-M (*Riverside*).) Thus, McKnight has not established that the Board's decision contains a prejudicial error of fact on this issue.

Cursory Investigation

McKnight asserts that the Board erred in failing to find that the City engaged in a cursory investigation of his alleged poor performance. As he did previously, McKnight argues that the failure to interview witnesses constituted a cursory investigation. As discussed above, however, the Board made the legal determination that the failure to interview employees in the absence of evidence establishing a regular practice of doing so does not support an inference of unlawful motive. (*Riverside*.)⁴ A disagreement over the legal analysis employed by the Board is not grounds for reconsideration even if it amounts to a prejudicial error of law resulting from application of its own case law. (*California State Employees Assn.*) Here, McKnight's disagreement is legal, not factual. Therefore, there is no basis for reconsideration of this issue.

Disparate Treatment

McKnight argues that the City engaged in disparate treatment in its investigation of his performance. He did not, however, except to the ALJ's finding of no disparate treatment. Moreover, as discussed above, the Board made the legal determination that the manner in which the City investigated the complaints about McKnight's performance did not establish an inference of unlawful motive. Accordingly, there is no basis for reconsideration on this issue.

⁴ The Board found that the City was entitled to rely on videotaped recordings of the incidents.

Other Facts Demonstrating Anti-Union Animus

McKnight asserts that other actions of his supervisor demonstrate anti-union animus. He did not, however, file exceptions to the ALJ's finding that there was no evidence of anti-union animus. Therefore, we find no basis to consider this claim on reconsideration.

Not a Probationary Employee

McKnight objects to the finding that he was a probationary employee at the time of his termination, contending that the City unlawfully extended his probation following a medical leave of absence. McKnight did not raise this issue on exceptions to the ALJ's proposed decision, and we find no basis to consider it here.

ORDER

The request of Alfred McKnight for reconsideration of the Public Employment Relations Board's decision in *City of Santa Monica* (2011) PERB Decision No. 2211-M, Case No. LA-CE-523-M, is hereby DENIED.

Chair Martinez and Member McKeag joined in this Decision.